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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:

Geographic Partitioning and
Spectrum Disaggregation by
Commercial Mobile Radio
Services Licensees

WT Docket No. 96-148

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Implementation of Section 257
of the Communications Act --
Elimination of Market Entry
Barriers

GN Docket No. 96-113

REPLY COMMENTS OF THE PERSONAL
COMMUNICATIONS INDUSTRY ASSOCIATION

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**REPLY COMMENTS OF THE PERSONAL
COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA")¹ hereby submits its reply to comments filed in the above-captioned proceeding.² The *Notice* proposes to allow all broadband personal communications service ("PCS") licensees to subdivide their licenses through geographic partitioning or spectrum disaggregation. In its original comments in this proceeding, PCIA strongly supported the Commission's

¹ PCIA's federation of councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

² Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148 (July 15, 1996) ("*Notice*").

proposals, and it suggested some additional means for providing increased flexibility to licensees consistent with the Commission's goals. As discussed below, PCIA believes the record in this proceeding supports both the *Notice* proposals and the measures suggested by PCIA and others designed to afford licensees' maximal flexibility and to increase competition. PCIA objects, however, to those commenters seeking to hamper the partitioning and disaggregation policies by imposing needless procedural requirements or creating "rights of first refusal" that would constrain the functioning of the free market.

I. INTRODUCTION AND SUMMARY

On August 15, 1996, PCIA filed comments supporting the *Notice* proposals and recommending that the Commission establish geographic partitioning and spectrum disaggregation rules guaranteeing licensees sufficient flexibility to appropriately structure their businesses. The essential elements of PCIA's initial comments included:

- Support for additional liberalization of the partitioning rules to include any recognized geopolitical boundary.
- Allowing licensees to seek expedited waivers of the boundary requirements for partitioning proposals.
- Support for immediate disaggregation of spectrum, regardless of whether the licensee had met the 5-year construction requirement.
- Adoption of the specific terms of the Commission's first build-out option.

- Providing additional flexibility to partitionees and disaggregates concerning the second build-out option proposed by the Commission to allow the original licensee to certify that both the 5-year and the 10-year build-out obligations will be satisfied.
- Recognition of contractual provisions allowing an original licensee to reclaim partitioned or disaggregated spectrum if a new licensee defaults.

The record reflects broad support for PCIA's suggestions. Of the commenters that expressed an opinion concerning the proper geographic border for partitioning, a clear majority expressed an interest in a permissive partitioning that considers additional geopolitical boundaries.³ Like PCIA, U S West, Inc. suggested that the Commission entertain waivers to use alternative boundaries when to do so would be more meaningful.⁴ Parties also supported the elimination of the requirement that the 5-year construction milestone be completed before disaggregation is allowed.⁵ Consistent with PCIA, most commenting parties supported the Commission's first build-out proposal as drafted, but favored revision of the second build-out option to provide additional flexibility. Finally, like PCIA, BellSouth commented that in cases

³ See Airgate Wireless, LLC Comments at 3; BellSouth Corporation Comments at 4; Carolina Independents Comments at 3-5; Industrial Telecommunications Association, Inc. Comments at 5; Omnipoint Corporation Comments at 9; PCS Wisconsin, LLC Comments at 2; U S West, Inc. Comments at 16; SR Telecom, Inc. Comments at 8-9; United States Telephone Association Comments at 6-8; and Yelm Telephone Company Comments at 1-3. Unless otherwise indicated all comments referenced in this pleading were filed in the opening round of WT Docket No. 96-148.

⁴ US West, Inc. Comments at 16.

⁵ AT&T Wireless Services, Inc. Comments at 5; BellSouth Corporation Comments at 12; Cellular Telecommunications Industry Association Comments at 8; GTE Comments at 4-5; PCS Wisconsin, LLC Comments at 5.

of termination or cancellation of a partitionee's authorization, geographically partitioned licenses should revert back to the initial licensee to ensure continuous provision of service.

Clearly, the record demonstrates that competition and the provision of services to consumers will be enhanced by allowing maximum flexibility under the Commission's disaggregation and geographic partitioning policies. Below, PCIA illuminates certain areas where flexibility can be further enhanced. In particular, PCIA believes that the Commission should:

- Avoid placing excess administrative burdens on licensees in its effort to increase small business opportunities.
- Reject requests by the rural telephone companies for a "right of first refusal."
- Establish even-handed microwave cost sharing obligations that treat partitionees and disaggregates like other licensees.
- Modify the construction requirements to equip licensees with added flexibility.
- Allow contractual division of installment payment obligations.

II. THE COMMISSION'S PROPOSALS WILL INCREASE SMALL BUSINESS OPPORTUNITIES WITHOUT THE NEED FOR ADDITIONAL, NEEDLESS ADMINISTRATIVE OVERSIGHT

In the opening round, National Paging & Personal Communications Association ("NPPCA") supported geographic partitioning and disaggregation only if certain small business development procedures and conditions were met. Specifically, NPPCA argues that, "if the CMRS licensee opts not to enter into an agreement with a small business entity, . . . then the small business licensee and the entity which will acquire

the partitioned and/or disaggregated spectrum [should] be required to present a plan which includes measurable opportunities for small businesses to receive reseller and/or agent agreements to provide products and services to the markets partitioned or disaggregated."⁶ These procedures would also apply "[i]n the event that a consortium of companies desires to acquire partitioned and/or disaggregated spectrum, and one or more of the businesses have revenues which exceed the cap for a small business."⁷

PCIA opposes NPPCA's imposition of unnecessary administrative burdens on parties seeking partitioning or disaggregation. First, the proposal would significantly increase regulation, working to the detriment of competition without measurable benefit. NPPCA's suggestion runs contrary to the congressional mandate of "promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers."⁸

Second, adoption of NPPCA's procedures is simply unnecessary to meet Congressional goals of increasing small business opportunities. Small businesses already have been granted substantial PCS benefits, including set asides, bidding credits, and installment payment plans. Moreover, adoption of the proposed disaggregation and partitioning plans will further increase small business opportunities by creating the possibility of smaller spectrum blocks and regions better tailored for

⁶ NPPCA Comments at 3.

⁷ *Id.*

⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 1 (1996).

niche services. Those smaller blocks and regions constitute more realistic entry opportunities for very small companies.

Under the circumstances, the Commission should not impose needless and administratively burdensome responsibilities on parties seeking disaggregation or partitioning. To the extent that the market will support additional resellers and agents, parties are free to negotiate with licensees to fill those opportunities. Congress mandated only that the Commission consider means for increasing small business opportunities to participate in the provision of PCS, and the Commission has effectively discharged that obligation. Congress did *not* require the Commission to mandate that successful businesses be created for small entities, an action that would be contrary to the Commission longstanding pro-competitive policies. NPPCA's request should be denied.

III. NO "RIGHT OF FIRST REFUSAL" SHOULD BE GRANTED TO RURAL TELEPHONE COMPANIES

Some commenters in this proceeding also proposed rules to provide for an initial "right of first refusal" by rural CMRS providers and rural telephone companies as a prerequisite to obtain partitioning or disaggregation in areas included within the rural service areas where such entities presently provide service.⁹ Essentially, these parties seek a rule that would allow them to assume the place of a potential partitionee or disaggregatee, despite never before having evidenced any interest in the market.

⁹ See USTA Comments at 4-6; Rural Cellular Association Comments at 4.

There is no justification for the Commission to adopt such a rule. The 1993 Omnibus Budget Reconciliation Act sought to provide *opportunities* for rural telephone companies to participate in the provision of PCS. The Commission has, in fact, provided numerous opportunities for rural telephone companies to participate. Rural telephone companies have been the only companies with the ability to form consortias to bid for licenses with the explicit knowledge that they would be able to partition the market after the auction. Even if the *Notice* proposals are adopted, no other licenses will have had this benefit during the critical pre-auction coalition building phase. Similarly, even if the geographic partitioning rules are changed, rural telephone companies have had a long period where they alone could negotiate partitions -- effectively a headstart over other potential partitionees. Thus, opportunities were given to rural telephone companies during the auctions. If a rural telephone company has elected not to participate in the auctions and has slept on its partitioning rights, the Commission should not form regulations to give them additional, special rights at this time. Afterall, the legislation does not create an exclusive right for rural telephone companies to participate in PCS.

Moreover, the argument for a right of first refusal is pure overreaching. It ignores the realities of the environment in which disaggregation and partitioning arrangements will be negotiated. For example, a licensee may have negotiated a partitioning agreement with a particular company because that company has agreed to other conditions, such as roaming or switch sharing. And, while a company may be willing to share switches or develop integrated regional networks with a partitionee or

disaggregatee of its choosing (which could be an affiliate or related company), it may not be willing to entertain such relationships with a rural telephone company with which it has no prior history. The partitioning agreement thus cannot be separated out to stand on its own. Allowing the proposed right of first refusal may also interfere with regionalization plans that implicate more than one licensee.

In effect, the "right of first refusal" proposal utterly fails to recognize that a right of first refusal is a property interest generally granted for consideration. Absent consideration by the rural telephone company, a "right" of first refusal created by regulatory fiat is no more than an intrusion into the free functioning of the market for PCS spectrum. There has been no demonstrated basis for such a market distortion and, accordingly, if a rural telephone company is interested in obtaining partitioned or disaggregated spectrum, it should negotiate with the licensee holder like any other party.

IV. THE MICROWAVE COST SHARING OBLIGATIONS OF PARTITIONEES AND DISAGGREGATEES SHOULD BE NO GREATER OR LESSER THAN OTHER LICENSEES

The American Petroleum Institute ("API") argues that PCS auction winners should retain ultimate responsibility for the cost-sharing obligations of the entities to whom they partition and/or disaggregate their licenses.¹⁰ This is an inappropriate proposal. In the spring, the Commission adopted a plan for the sharing of costs for

¹⁰ API Comments at 3.

relocating fixed microwave facilities in the 2 GHz band allocated to broadband PCS.¹¹ Under this cost sharing plan, later-entrant PCS licensees will have reimbursement obligations when they have benefitted from the spectrum-clearing efforts of another party.¹² The *Notice* concluded that "a new entrant PCS licensee who gains its license through partitioning or disaggregation should be treated as any other subsequent PCS licensee for the purposes of the relocation cost-sharing plan."¹³ API has not presented any valid reasons why partitionees and disaggregates should not be treated in the same manner as other licensees.

V. THE CONSTRUCTION REQUIREMENTS SHOULD BE MODIFIED TO AFFORD ADDITIONAL FLEXIBILITY TO LICENSEES, CONSISTENT WITH THE COMMISSION'S BUILD OUT OBJECTIVES

In its original comments in this docket, PCIA argued that the second build-out option proposed for partitionees and disaggregates be modified to provide further flexibility to licensees. Specifically, PCIA argued that if the partitionor (or disaggregator) certifies that it will independently meet both the five- and ten-year build-out requirements, the partitionee (or disaggregatee) should be required only to meet the "substantial service" standard at the end of the license term. In effect, this provides

¹¹ Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave relocation, WT Docket No. 95-157, FCC 96-196, *First Report and Order and Further Notice of Proposed Rulemaking* (released Apr 30, 1996) (summarized in 61 Fed Reg. 24470) (May 15, 1996).

¹² *Id.* at ¶¶ 71-77 and Appendix A.

¹³ *Notice* at ¶ 64.

licensees with the flexibility to disaggregate smaller amounts of spectrum for "niche" types of service that are not intended to be full coverage, wide-area systems.¹⁴ It is also beneficial in cases where an entity with a particularly strong desire to rapidly serve a smaller area can accelerate the overall provision of service to the public, without the complexity of having to survey coverage and estimate population bases. Modification of the second coverage option in the suggested manner will thus primarily benefit small business entities, which will be able to undertake entry opportunities without becoming subject to onerous construction benchmarks.

In this regard, PCIA also believes licensee flexibility, and therefore competition, would be enhanced if, as suggested by AT&T Wireless, parties were able to contractually allocate construction requirements. If a partitionor (or disaggregator) and a partitionee (or disaggregatee) negotiated a commercially reasonable, arms-length, and bona fide agreement that assigned to each of the contracting parties partial responsibility for meeting the overall market's construction requirement, the Commission should give effect to the parties' agreement. In effect, this allows the entities with the most commercial knowledge of the market and its characteristics to set reasonable and fair benchmarks, instead of attempting to rely on overbroad assumptions about fractions of overall market population and area or other external references. At

¹⁴ This suggested change would also address the concern of U S West that geographic service area coverage requirements are ill-suited for types of fixed services, such as wireless local loops, encouraged by the Commission. *See* U S West Comments at 3.

the same time, the suggested change would ensure that, examining the overall market as a whole, the Commission's prior determinations on expected coverage are met.

**VI. THE COMMISSION SHOULD NOT PRECLUDE CONTRACTUAL
DIVISION OF INSTALLMENT PAYMENT OBLIGATIONS**

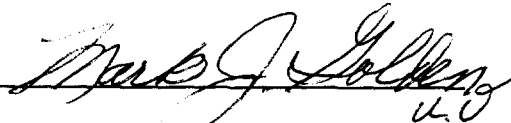
As a final matter, PCIA notes that Airgate and others have argued that partitionees (or disaggregates) should not be *required* to guarantee payment of the obligations assumed by the original licensee in the auction. While PCIA generally concurs, PCIA believes that the Commission should give effect to *voluntary* contractual agreements between partitionors and partitionees (or between disaggregators and disaggregates) that allocate continuing payment obligations under installment payment plans between the new licensees, as long as any such agreements are commercially reasonable, negotiated at arms length, and bona fide. In other words, if a small business licensee partitions part of its C Block license territory to a second qualifying small business, the two entities should be permitted to contractually divide the payment obligation to the U.S. Treasury originally undertaken by the first licensee.

VII. CONCLUSION

The ultimate goal of this proceeding should be to facilitate the comprehensive and prompt delivery of broadband PCS to consumers in a pro-competitive deregulatory manner. In order to accomplish these goals the Commission must enact spectrum disaggregation and geographic partitioning rules that extend extensive flexibility to licensees. PCIA's proposals as outlined above and in its initial comments will help establish the proper regulatory environment for disaggregation and partitioning.

Respectfully submitted,

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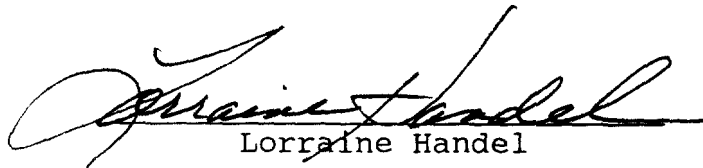
Dated: August 30, 1996

CERTIFICATE OF SERVICE

I, Lorraine Handel, hereby certify that copies of the foregoing "Comments of the Personal Communications Industry Association" were served upon the following individuals by first-class, postage prepaid mail:

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